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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FRANK P. DELGEORGE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ELLEN M. VIAKLEY *
3210 Gulf Tower
707 Grant Street
Pittsburgh, PA 15219
(412) 471-2230

JOHN L. DOHERTY
MANIFESTO DOHERTY
& DONAHOE, P.C.
1550 Koppers Building
Pittsburgh, PA 15219
(412) 471-8893
Counsel for Petitioner

* Counsel of Record

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QUESTIONS PRESENTED

1. Under *United States v. Leon*, whether a search warrant authorizing federal agents to search "a black Spalding gym bag in the Western District of Pennsylvania" is so facially deficient as to preclude objectively reasonable reliance on the warrant as a valid instrument of power to search?

    a. Whether extrinsic information, i.e., the executing officer's personal knowledge of the location of the bag, may be used under *Leon* to support a finding that reliance on the validity of this facially deficient warrant was objectively reasonable?

2. Whether Petitioner's encounter with federal agents comprised an unlawful Fourth Amendment seizure?

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No. ——

FRANK P. DELGEORGE,

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Frank P. DelGeorge respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered on February 9, 1989.

OPINIONS BELOW

The Court of Appeals for the Third Circuit affirmed the order and opinion of the district court by judgment order. The opinion of the United States District Court for the Western District of Pennsylvania is unreported and is reprinted in the appendix, p. 4a, *infra.*

JURISDICTION

Petitioner was charged by indictment in the United States District Court with violating federal criminal statutes. Judgment of conviction was entered by the district court on October 12, 1988.

On Petitioner's appeal, the Third Circuit on February 9, 1989 entered judgment affirming the conviction. A

timely petition for rehearing was filed and was denied by order entered March 15, 1989.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. 1254(1) and Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This case involves Petitioner's challenge to the legality of a forty-minute "encounter" with agents of the federal Drug Enforcement Administration and to the seizure of evidence from personal luggage pursuant to a warrant which was constitutionally defective in failing to describe with particularity the place to be searched.

On March 4, 1988 Petitioner DelGeorge arrived at the Amtrak station in Pittsburgh on a train from New York City. Several minutes later as he attempted to enter the passenger side of his friend's car, he was stopped by Alexander Schiraj, who identified himself as a drug enforcement agent and began to question DelGeorge.[1] The agent

[1] Schiraj testified that he suspected DelGeorge of carrying narcotics based on the following facts: (1) he arrived from a source city; (2) he carried no luggage other than a gym bag; (3) he failed to greet the person who was waiting for him in Pittsburgh until both men were off the train platform, which Schiraj interpreted as an attempt at concealment; and (4) his companion's eyes had "widened" periodically prior to the train's arrival, creating the impression of nervousness. Because the decision below was based on a finding that DelGeorge was never detained, the issue of whether such facts would be sufficient to justify an investigatory stop was not addressed.

described DelGeorge's position at this point as "stuffed in" between an adjacent car and a cement wall, and the agent's approach from the rear obstructed DelGeorge's only route of egress. A second agent simultaneously approached the driver on the opposite side of the car. Two other federal agents were in the immediate vicinity of the car monitoring the encounter; and two local police officers subsequently arrived at the scene, pulling in directly behind the car DelGeorge attempted to enter.

DelGeorge was asked if he had just disembarked from the New York train and where he was from, and he responded truthfully. He complied with Schiraj's request to produce identification, and his driver's license confirmed the information he had given Schiraj verbally. Schiraj continued to question DelGeorge for a period of approximately twenty minutes, then moved to the other side of the car to question Rubin, and then returned to question DelGeorge again. DelGeorge had been carrying a black canvas Spalding gym bag when he got off the train; at the time of Schiraj's initial approach he placed the bag on the coment wall. DelGeorge refused to consent to a search of the bag, and was then advised that Schiraj wanted to keep the bag until a canine sniff test could be conducted. DelGeorge's response was, "I guess, yeah." At this point, twenty five minutes into the encounter, DelGeorge asked if he was under arrest and was told that he was not. He then asked if he could leave to make a phone call and was told that he was "free to make a phone call". When DelGeorge left to make his call, he was accompanied by two agents who stayed close enough to him during his brief sojourn from the scene to hear the entire substance of his phone conversation, including the message on the answering machine on the other end of the line. When he returned, he was told that a call had been placed to the canine unit. At this point, forty minutes into the encounter, DelGeorge was advised for the first time that he was free to go; the bag remained

in DEA custody. The dog later alerted to the bag; and an application for a search warrant was then filed, relying on the posititive canine test to establish probable cause. The warrant was issued the same day, authorizing agents to search for controlled substances and related paraphernalia:

> . . . on the premises known as a a black canvas Spalding gym bag with red handles, stripes and trim, approximately 12″x28″x15″ in dimension and weighing approximately 30 pounds in the Western District of Pennsylvania.

App., p. 9a. No further description of the bag's location, or the identity and location of its possessor, was provided. The bag that was searched under the warrant yielded quantities of marijuana and cocaine, which form the basis of the indictment subsequently presented against DelGeorge.

Prior to trial DelGeorge filed a motion to suppress the physical evidence, contending that he had been unlawfully detained and, further, that the warrant pursuant to which evidence was seized was constitutionally deficient in failing to describe with particularity the place to be searched. The district court denied the motion, holding that the encounter to which DelGeorge had been subjected did not comprise investigatory detention. The court rested its conclusion on the finding that "the best evidence that DelGeorge was free to go was that he departed the scene." App., p. 6a. On the warrant issue, the district court held that because the bag "was already in the custody of the authorities . . . I don't think that the failure to satisfy the particularity requirement is a good reason for suppressing the evidence in this case." App., p. 7a.

DelGeorge subsequently entered a conditional plea of guilt to Count I of the indictment, expressly reserving the right to appeal the district court's denial of the motion to suppress. He was sentenced on October 12, 1988 to

serve a term of imprisonment of five years, followed by a four-year term of supervised release.

Notice of appeal to the Third Circuit was timely filed. Following oral argument, the conviction was affirmed by judgment order entered February 9, 1989. App., p. 1a. A Petition for Rehearing and/or Rehearing In Banc was timely filed and was denied by order entered March 15, 1989. App., p. 3a.

REASONS FOR GRANTING THE WRIT

Given the fact that neither of the lower courts ventured a written opinion on the issues presented, Petitioner acknowledges that his request for review by this Court is somewhat extraordinary. Two factors impelled the filing. First, resolution by this Court of the issues presented would advance and clarify areas of potentially great import, particularly regarding the bounds of the good faith exception. Second, the filing was impelled because the result below does violence to the principle at the core of the Fourth Amendment: the protection of citizens from the exercise of arbitrary governmental power. The fact that the lower court, after having requested oral argument, was unwilling to address these issues directly does not lessen their importance. It would be unjust if the court of appeals' decision to evade the issues by the expedient of a judgment order were permitted to have the further effect of automatically barring merits review and adjudication by this Court. Petitioner, therefore, asks that certiorari be granted for the following reasons.

I. THERE IS AN EVEN SPLIT AMONG SIX CIRCUITS ON THE QUESTION WHETHER INFORMATION EXTRINSIC TO A FACIALLY DEFICIENT WARRANT MAY BE CONSIDERED IN ASSESSING ITS "GOOD FAITH" EXECUTION

With its decision in *United States v. Leon*, 468 U.S. 897 (1984) the Court created the first exception to the exclusionary rule announced in *Weeks v. United States*,

232 U.S. 383 (1915). *Leon* held that the Fourth Amendment does not require suppression of evidence obtained by officers acting in reliance on a search warrant issued by a neutral and detached magistrate but ultimately found to be unsupported by probable cause.[2] *Leon* has become the primary focus of Fourth Amendment litigation. But in one area—when and under what circumstances suppression is required for evidence seized under a facially deficient warrant—the application of *Leon* remains uncertain and unclear.

The issue in *Leon* was not the *facial* sufficiency of the warrant, but whether it was objectively reasonable for the officer to rely on the sufficiency of the documents underlying the warrant, in particular, the affidavit's recital of probable cause. This inquiry necessarily focused on information extrinsic to the warrant. The Court went on, however, to identify a different warrant problem which would mandate a different result:

> . . . depending on the circumstances of the particular case, a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

Id. at 923. Warrants which are facially deficient in their failure to describe with particularity the place to be searched have historically been reviewed without reference

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[2] Although the doctrine announced in *Leon* is often referred to as the "good faith exception" to the exclusionary rule, the term is something of a misnomer insofar as it may suggest that either the intent of the officer or his subjective good faith is relevant. *Leon* restricts the inquiry to the "objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." *Id.*, 468 U.S. at 922. Under this objective analysis, an officer is presumed to have a "reasonable knowledge of what the law prohibits." *Id.* at 920, n.20.

to extrinsic information.[3] The proper application of the good faith exception to such warrants is the crux of the issue presented here.

On the same day that *Leon* was decided, the Court announced its opinion in *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). *Sheppard* applied the principles of *Leon* to a warrant which was not facially deficient, but facially wrong in describing the property to be seized.[4] The narrow issue addressed under *Leon* was whether it was objectively reasonable for the officer to rely on a judge's assurance that the necessary changes had been made on the warrant and to execute it without having read it again to confirm the corrections. *Id.* at 989 and n.6. Noting that the police had taken "every step that could reasonably be expected of them", the Court refused to rule that the officer was "required to disbelieve a judge." *Id.* at 989. The Court cautioned that the failure of another officer to notice the defect might not be justified. "We hold *only* that it was not unreasonable for the police in this case to rely on the judge's assurances." *Id.* at 989, n.6 (emphasis added). Given the way the issue was framed, *Sheppard* also relied on extrinsic information.

There remains, however, a constitutionally relevant distinction between an inaccurate warrant and a *general warrant.* Warrants so lacking in particularity as to

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[3] See, e.g., *Marron v. United States*, 275 U.S. 192, 195-97 (1927) (focusing solely on facial attributes of the warrant); *United States v. Doe*, 703 F.2d 636, 638 (3d Cir. 1983) (minimum description required by the Fourth Amendment cannot be supplied by information extrinsic to the warrant).

[4] Compare, *United States v. Burke*, 784 F.2d 1090 (11th Cir. 1986) (where a particularized warrant is found on execution to be inaccurate, personal knowledge of the executing officer may be relied upon to resolve the ambiguity) and *United States v. Doe, supra*, n.3 (where the warrant is not particularized on its face, the minimum description required by the warrant clause cannot be supplied by extrinsic information).

amount to general warrants have historically been regarded as void *ab initio*. *Entick v. Carrington*, 19 Howell's St. Tr. 1029, 1067-68 (1765). General warrants, or "roving commissions", were described by a noted colonial lawyer, in words later cited by this Court, as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book", since they placed "the liberty of every man in the hands of every petty officer." *Marron v. United States*, 275 U.S. 192, 195 (1927). Proscription of such instruments of arbitrary power is at the very core of the Fourth Amendment. *Marcus v. Property Search Warrant*, 367 U.S. 717, 728-29 (1961). If there is any concept of Fourth Amendment law which reasonably well-trained officers must be deemed to know, it is that general warrants are constitutionally infirm. To hold otherwise is to license federal agents to function in ignorance—whether passive or active—of the most fundamental precept of the Fourth Amendment.

In *Leon* the Court acknowledged as much by holding that:

> . . . a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

Leon, *supra*, 468 U.S. at 923. The Court's reference to the *facial deficiency* of the warrant must be given its intended meaning; it must be read to require that where the warrant on its face fails to particularize the place to be searched, extrinsic information is irrelevant; the personal knowledge of the executing officer is irrelevant; the affidavit is irrelevant; and the scope of the actual search is irrelevant. Whether a search warrant authorizing federal agents to search "a black Spalding gym bag in the Western District of Pennsylvania" is so facially deficient as to preclude objectively reasonable reliance on it as a valid instrument of power to search is an issue

which can be decided only by reference to the warrant itself.

Following *Leon*, however, the Second, Third and Eleventh Circuits have relied on extrinsic information in concluding that reliance on facially deficient warrants was objectively reasonable. The First, Ninth and Tenth Circuits have taken a contrary view, restricting analysis under *Leon* to the face of the warrant.

As noted, the warrant in the present case empowered federal agents to search "a black Spalding gym bag in the Western District of Pennsylvania". The critical information omitted from the warrant was the location of the object to be searched. This is the functional equivalent of a warrant authorizing the search of a two-story brown brick house in the Western District. Such warrants amount to no more than the "roving commissions" or general warrants expressly prohibited by the Fourth Amendment. The lower court relied on extrinsic information regarding the actual location of the bag in concluding that the seizure of evidence under the warrant was not objectively unreasonable, noting that the fact that the bag was in DEA custody substantially diminished the chance that the warrant, although unrestricted on its face, would actually be used to invade innocent interests.[5] App., p. 7a. In an earlier case the Third Circuit had similarly relied on extrinsic information to avoid suppression of evidence seized under a facially deficient warrant. In *United States v. Kepner*, 843 F.2d 755, 763-64 (3d Cir. 1988), the court held that although the warrant was constitutionally overbroad on its face, suppression was not required because the detailed investigation outlined in the warrant affidavit demonstrated the officer's "good

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[5] Cf., *United States v. Marti*, 421 F.2d 1263, 1268-69 (2d Cir. 1970) (that agents executing a general warrant seized only those obscene films which were, in fact, contemplated by the affidavit, "does not erase the fact that appellants were subject under these warrants to a greater exercise of power)."

faith". It is submitted that reference to the affidavit, which was not even in the possession of the executing officer, ignores the issue squarely presented by *Leons*: whether the officer's reliance on the *facial* sufficiency of the warrant was objectively reasonable.

The Second Circuit employed a similar analysis in *United States v. Buck*, 813 F.2d 588 (2d Cir. 1987), cert. den. 108 S.Ct. 167 (1987), where the warrant empowered federal agents to seize "any papers, things or property of any kind relating to the previsously described crime." This warrant, which conferred essentially unrestricted authority on the executing officers to rummage through the suspect's personal effects, was found to be constitutionally overbroad. But because the court found that the warrant *affidavit* demonstrated the officer's "considerable efforts to comply with the dictates of the Fourth Amendment", suppression was not required. Similarly, in *United States v. Accardo*, 749 F.2d 1477, 1480 (11th Cir. 1985) the court relied on the details found in the warrant affidavit in holding that the agent's reliance on a constitutionally overbroad warrant was objectively reasonable under *Leon.*

On similar facts, the First, Ninth and Tenth Circuits have reached opposite results. In *United States v. Crozier*, 777 F.2d 1376 (9th Cir. 1985) the court found that a warrant authorizing seizure of "material evidence of a violation of 21 U.S.C. 841" was constitutionally overbroad and, further, that the executing officer could not reasonably have relied on the validity of a warrant which effectively authorized a general search. *Id.* at 1381. The court specifically rejected the government's argument that good faith could be demonstrated by the detailed affidavit and by the limited and reasonable nature of the search actually conducted. See, also, *United States v. Washington*, 797 F.2d 1461, 1473 (9th Cir. 1986) (no objectively reasonable reliance on constitutionally overbroad warrant); *United States v. Fuccillo*, 808 F.2d 173, 178 (1st Cir.

1987), *cert. den.*, 107 S.Ct. 2481 (1987) (same). In *United States v. Leary*, 846 F.2d 592 (10th Cir. 1988) the court refused to go beyond the face of the warrant, holding that unless the warrant affidavit is physically attached to, and specifically incorporated in, the warrant itself, it remains extrinsic to the warrant and is therefore irrelevant to the issue of whether the agent's reliance on the facial sufficiency of the warrant was objectively reasonable. *Id.* at 603-04, 609.[6]

The conflict among these circuits was created, in part, by the fact that both *Leon* and *Sheppard* relied on extrinsic information in reviewing search warrants. However, in neither of those cases did the Court review the issue squarely presented here: the applicability of the good faith exception to a warrant which is constitutionally deficient on its face in failing to particularize the place to be searched. Reliance on the *general* analysis employed in *Leon* and *Sheppard*, and failure to apprehend the constitutionally relevant distinction between an inaccurate warrant and a general warrant, produced the view adopted by the Second, Third and Eleventh Circuits.

Petitioner submits that the First, Ninth and Tenth Circuits have interpreted *Leon* correctly. To hold otherwise, to read *Leon* as providing that the facial deficiency of the warrant is irrelevant where the search itself is subsequently found to be reasonable, is to render the warrant clause of the Fourth Amendment meaningless. Any paper with a magistrate's signature will be sufficient authority to permit the search of unnamed places and the seizure or unspecified property—so long as the court later decides that the search actually conducted was not unreasonable. To shift the focus of Fourth Amendment warrant analysis to the reasonableness of the search itself would be to strip the Constitution's mandate—"no Warrants

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[6] See, also, *United States v. Strand*, 761 F.2d 449, 453 (8th Cir. 1985) (information from warrant application or affidavit irrelevant unless expressly incorporated in warrant).

shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized"—of all meaning and relevance. It is respectfully submitted that such a result was not within the Court's intent in *Leon*. Because the result below is inconsistent with *Leon*, because the issue has produced a clear divergence of authority in the circuits, and because resolution of the issue will provide definitive guidance in an area of law which will continue to be the source of substantial litigation, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the court of appeals.

II. THE JUDGMENT BELOW THAT PETITIONER'S ENCOUNTER WITH POLICE WAS CONSENSUAL AND DID NOT COMPRISE INVESTIGATIVE DETENTION IS IN DIRECT CONFLICT WITH *REID v. GEORGIA*, 448 U.S. 438 (1980)

The detention issues discussed *infra* need only be reached if Petitioner's position on the warrant question is not upheld. The issue is significant to the government's claim that Petitioner's bag was consensually in the possession of the DEA at the time of the canine sniff. If Petitioner was improperly detained, his purported consent to the DEA's retention of the bag would be invalid. *Florida v. Royer*, 460 U.S. 491, 501 (1983).

A person is detained for Fourth Amendment purposes when his liberty is in any way restrained, either by force or by show of authority. *Terry v. Ohio*, 392 U.S. 1 (1968). In *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) the Court provided further definition by holding that a Fourth Amendment seizure occurs if, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."

Petitioner argued below that *Reid v. Georgia*, 448 U.S. 438 (1980), decided shortly after *Mendenhall*, is con-

trolling precedent on the threshold issue of whether DelGeorge had been subjected to an investigatory stop. In *Reid*, a federal agent approached defendant as he was leaving the Atlanta Airport, identified himself as a narcotics agent, asked for identification and then asked defendant to step back inside the terminal and consent to a search of his bag. This encounter, which lasted only minutes, was found to comprise detention.[7] DelGeorge was similarly approached by an officer who identified himself as a narcotics agent, requested identification and asked DelGeorge to consent to a search of his bag. The only difference between this case and *Reid* is that the restraint of DelGeorge's liberty was much more extended; the encounter here lasted for 40 minutes. *Reid* therefore mandates a finding that a Fourth Amendment seizure did occur. The judgment below, which is premised on the conclusion that DelGeorge had not been detained, is in obvious conflict with *Reid*.[8]

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[7] Although there is some question in the courts of appeals regarding whether *Reid* intended to decide the question of whether a Fourth Amendment seizure occurred, see, e.g., *United States v. Ramirez-Cifuentes*, 682 F.2d 337, 343, n.6 (2d Cir. 1982), Petitioner submits that the following factors indicate that the seizure question was addressed and decided by the Court: (1) the opinion discussed the standards for Fourth Amendment seizures, defining detention as "any curtailment of a person's liberty by the police", *id.* at 440; (2) Chief Justice Rehnquist dissented from the majority holding because he disagreed that a seizure had occurred, *id.* at 442; and (3) three members of the Court wrote separately to emphasize their view that because the threshold question of whether the agent's initial stop constituted a seizure had not been addressed by the state court, their vote for reversal should not be interpreted as having decided that issue. *Ibid.* That leaves a majority of five members of the Court who found the police conduct sufficiently restrictive to comprise detention.

[8] On the issue not reached by the courts below—the existence of reasonable, articulable suspicion to believe that DelGeorge was engaged in criminal activity—the facts presented here are virtually identical to those reviewed in *Reid* and found to be insufficient to support the stop. See, n.1, *supra*.

III. THE CIRCUITS ARE IN CONFLICT REGARDING FACTORS WHICH TRANSFORM A CITIZEN'S ENCOUNTER WITH POLICE INTO A FOURTH AMENDMENT SEIZURE. THIS CASE WOULD PROVIDE A CLEAR FACTUAL PREDICATE FOR RESOLUTION OF SUCH CONFLICTS

Following *Reid*, the Court in *Florida v. Royer*, 460 U.S. 491 (1983) identified additional factors relevant to characterizing citizen/police encounters:

> Asking for and examining Royer's ticket and his driver's license were no doubt permissible in themselves, but when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment.

Id. at 501.[9] The Court held that such conduct went *beyond* an investigative stop and comprised an arrest. If the encounter remained consensual through the first factor (requesting identification), but on consideration of all factors was found to have exceeded the bounds of detention and entered the category of arrest, then the level at which the facts combine to produce an investigatory stop is somewhere between. Courts of appeals have since endeavored to find that point "between".

The Fifth, Seventh and Eighth Circuits have held that the point is reached when the agent identifies himself as a narcotics investigator and asks to search the suspect's luggage, an approach which is consistent with *Reid*.[10]

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[9] See, also, *INS v. Delgado*, 466 U.S. 210, 216-17 (1984) (questioning about identity does not, by itself constitute a Fourth Amendment seizure).

[10] *United States v. Gonzales*, 842 F.2d 748, 752 (5th Cir. 1988); *United States v. Borys*, 766 F.2d 304, 311 (7th Cir. 1985), *cert. den.*, 474 U.S. 1082 (1985); *United States v. Large*, 729 F.2d 636,

The Sixth and Eleventh Circuits have held that an individual approached by an agent who identifies himself as a narcotics investigator and asks the individual to accompany him to another area of the airport is effectively seized.[11] The Eighth Circuit has held, to the contrary, that an officer who displays his badge and gestures to the suspect to move to another area for questioning does not effect a seizure.[12] In a recent opinion the Eighth Circuit held that questioning which indicates that the suspect is the focus of a narcotics investigation creates a reasonable belief that the encounter is "more than routine" and transforms the encounter into detention.[13] The Fifth Circuit recently reversed itself on the same point.[14] Factors identified by the First Circuit as critical to the determination include the length of the encounter, whether questioning was prolonged after truthful answers to preliminary inquiries, failure to tell the defendant at the outset that he was free to go, and the number and position of officers at the scene.[15] As this brief review

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638 (8th Cir. 1984). Cf., *United States v. Notorianni*, 729 F.2d 520, 522 (7th Cir. 1984) (identification as narcotics investigator and request to answer questions not a seizure, distinguishing circumstance where request to search luggage is made).

[11] *United States v. Knox*, 839 F.2d 285, 289 (6th Cir. 1988); *United States v. Espinosa-Guerra*, 805 F.2d 1502, 1507 (11th Cir. 1986).

[12] *United States v. Poitier*, 818 F.2d 679, 683 (8th Cir. 1987).

[13] *United States v. Munley*, No. 88-2169, Slip Op., April 19, 1989 (8th Cir. 1989), 1989 U.S.App. Lexis 5168.

[14] Compare, *United States v. Hinson*, 801 F.2d 757, 761 (5th Cir. 1986) (seizure occurred when defendant told he was suspected of carrying narcotics) and *United States v. Corral-Franco*, 848 F.2d 536, 541 (5th Cir. 1988) (encounter was consensual notwithstanding perecption that defendant was focus of an investigation).

[15] *United States v. Berryman*, 717 F.2d 651, 654-56 (1st Cir. 1983).

indicates, there is no consensus on what factors are particularly significant to the inquiry.

This case would present the following factors for review: (1) the agent approached DelGeorge in a public area and requested identification; (2) the agent identified himself as a narcotics investigator (but did not explicitly advise DelGeorge that he was suspected of carrying narcotics); (3) the agent asked to search DelGeorge's luggage, and consent was refused; (4) the encounter continued for a period of 40 minutes; (5) the total number of state and federal officers at the scene was six, two of whom were directly involved in the questioning; (6) twenty-five minutes into the encounter DelGeorge was advised that he was not under arrest; and (7) DelGeorge was first told that he was free to go forty minutes after the encounter began. Such facts would offer a clear predicate for resolution of the following questions, *inter alia*:

1. Does a federal agent's conduct in approaching a traveler in a public area, identifying himself as a narcotics investigator and requesting consent to search personal luggage effect a Fourth Amendment seizure?

2. Does the length of the encounter alone require a finding that the suspect was detained? [16]

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[16] Cf., *United States v. Place*, 462 U.S. 696, 709 (1983) holding that, "The length of detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause." See, also, *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) identifying the length of the encounter as a significant factor.

3. What is the significance of such additional factors as the number and position of officers and Agent Schiraj's position (obstructing DelGeorge's route of egress) in evaluating the encounter?

It is respectfully submitted that resolution of these questions would substantially narrow the range of litigable issues in this area and provide greater clarity to the law than presently exists. This Court's recent decision in *United States v. Sokolow*, No. 87-1259, U.S.S.Ct. (April 3, 1989), 57 U.S.L.W. 4401, clarified the second prong of the inquiry regarding investigative detention, i.e., the quantum of fact necessary to justify an investigatory stop. As a companion to *Sokolow*, this case would enable the Court to clarify the threshold issue of whether an investigatory stop, in fact, occurred. Therefore, Petitioner requests that a writ of certiorari issue to review the judgment of the court of appeals.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

ELLEN M. VIAKLEY *
3210 Gulf Tower
707 Grant Street
Pittsburgh, PA 15219
(412) 471-2230

JOHN L. DOHERTY
MANIFESTO DOHERTY
& DONAHOE, P.C.
1550 Koppers Building
Pittsburgh, PA 15219
(412) 471-8893
Counsel for Petitioner

* Counsel of Record

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3689

UNITED STATES OF AMERICA

v.

FRANK P. DELGEORGE,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 88-00044)
District Court Judge: Barron P. McCune

Argued February 6, 1989

Before: SLOVITER, BECKER and WEIS, *Circuit Judges*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to wit:

1. The facts available to the agent did not give rise to a reasonable articulable suspicion of criminal activity. The detention of appellant and, particularly, of his per-

sonal luggage was therefore in violation of the Fourth Amendment;

2. DEA conduct with regard to appellant's personal luggage exceeded the bounds of permissible investigative detention and cannot be justified in the absence of probable cause;

3. Appellant's encounter with the DEA was not consensual; and

4. The search warrant which purported to authorize the seizure of evidence from appellant's luggage was so facially deficient as to preclude objectively reasonable reliance on its validity.

It is ORDERED and ADJUDGED that the judgment of the district court be and is hereby affirmed.

By the Court,

/s/ Delores K. Sloviter
Circuit Judge

Attest:

SALLY MRVOS
Sally Mrvos, Clerk

Dated: Feb. 9, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3689

UNITED STATES OF AMERICA

v.

FRANK P. DELGEORGE,
Appellant

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and NYGAARD, WEIS,* *Circuit Judges*

The petition for rehearing filed by Appellant, Frank P. Delgeorge in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ D. K. Sloviter
Circuit Judge

Dated: Mar. 15, 1989

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* As to panel rehearing only.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal Action 88-44

UNITED STATES OF AMERICA

vs.

FRANK P. DELGEORGE

OPINION

(Transcript of Oral Opinion)

The motion to suppress the evidence will be denied. In the Court's view, there is ample reason here to sustain the search and the search warrant.

As stated by U.S. versus Cortez, all of these cases depend upon the particular facts in question, and, of course, the whole picture must be taken into account, based upon the view of the officers—that is, viewed in the eyes of an officer who has, of course, some training in viewing objective evidence.

I think, in Cortez, the Supreme Court said that the officer may consider patterns and modes of operation of certain kinds of suspects, and an officer who is trained in a particular field may draw inferences and make deductions that an ordinary citizen might not make or might not be able to make. I think the conclusion there was that the evidence must be weighed by the officer and yield a particular suspicion that the person stopped was engaged in some form of wrongdoing.

In this case, the findings of fact are that Agent Schiraj knew that New York was a so-called source city. Of course, there are a lot of source cities, but New York is one of them. He knew—he had to know that cocaine was coming into Pittsburgh because none is made here—that is none is grown here, and there is a great deal of it here, so he knew it was coming in and it was being carried by people.

Now, on March third, he saw a man, later identified here as Rubin, who appeared to be watching him apprehensively. Schiraj didn't use the word, apprehensively, I used that word. He said Rubin was nervous and watched him and then he went and made a phone call. An officer could have concluded that the phone call was made to ask for instructions, or an officer could conclude that Rubin called someone and said, "There are two suspicious looking guys here that I think are drug agents, and, under those conditions, shall I stay here or get out of here?"

In any event, Schiraj was made very suspicious by Rubin. He tried to check out Rubin through his license plate on his car, found out the name of the owner of the car and the fact that the owner of the car had suffered a license suspension. That might not have been of very great weight, but it added to his suspicion, because a young man who drives under suspension, of course, ignores the law, but, the next day, he saw Rubin there again, and Rubin acted very much the same, kept watching him, and then he saw Rubin nod as the train came in and the passengers departed; instead of the young man to whom the nod was directed coming over and greeting Rubin, he appeared to look at the ground as he walked, and Schiraj watched these fellows, and they entered a wooden canopy. This is the location where they greeted one another.

Now, Schiraj, I think, was entitled to conclude that if two young men were friends and innocent, they would

have greeted one another right out in the open. I think most any officer would have been suspicious, then, since they met when obscured from view, so, then, Schiraj started to follow them to the car, but Schiraj didn't—he did not detain the person at that time. He asked to talk to them. He said, "Who are you, and what are you doing here?"

Well, the person later identified as DelGeorge said, "I came to Pittsburgh to see my girlfriend." Well, he didn't know where she lived. That would be strange to an officer, so Schiraj's suspicion arose—increased, rather, as the time went along.

He said, "What is the name of your friend?" Well, he knew—apparently knew the name of his friend, but apparently Rubin didn't know his name, so I think that Schiraj was entitled to be suspicious, and he merely asked to be given permission to look in the bag. Of course, that was denied. That made him more suspicious, of course, as time went along.

He didn't arrest DelGeorge or detain him. He did have officers follow him when he went to make a phone call, but the best evidence that DelGeorge was free to go was that he departed the scene before the dog was obtained. I think the recent cases permit the sniffing of a bag by a trained dog.

One of the complaints here is that the procedure took too long. I find that it didn't take an excessive length of time. The dog was there within about an hour of the train arriving. It then took a few minutes to take the bag to the Drug Administration offices, where the dog made the positive indication. I don't think that is an excessive amount of time, and I don't think that time was really of the essence in this case, because DelGeorge wasn't under time constraints. He didn't say, "I have to catch a plane or a bus," or, "I insist that you do this quickly so that I can depart." He knew very well that he had better get out of there, and he did.

I have examined the affidavit for the search warrant, and it recites pretty much the facts I have found here, plus the fact that the dog alerted to the location of the narcotics in the bag. I find that the affidavit for the search warrant was properly filed and probable cause established by it for the issuance of a valid warrant, and, of course, after the warrant was obtained, the luggage was opened and the drugs found.

Whether the search warrant fulfilled the particularity requirement of the 4th Amendment has been raised. I find that the particularity requirement has to be considered, taking into account such factors as the purpose for which the warrant was issued and the nature of the items to which it is directed and, again, the total circumstances of the case.

The bag of course had no address. It was in the DEA office. It was already in the custody of the authorities, so I don't think that the failure to satisfactory the particularity requirement is a good reason for suppressing the evidence in this case.

On the whole, this is a stronger case than U.S. versus West, which is a First Circuit Court case, 731 F.2d 90. I think it comports with U.S. versus Cortez, 449 U.S. 411, and the Supreme Court has asked, "Is the intrusion upon the privacy of the person reasonable in relation to the justification for its initiation?" I think the intrusion on DelGeorge's privacy here was very reasonable in relation to the justification for its initiation, that is the interdiction of the flow of cocaine.

For these reasons, we will deny the motion to suppress and list the case for trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal Action 88-44

UNITED STATES OF AMERICA

vs.

FRANK P. DELGEORGE

ORDER

AND NOW, July 1, 1988, the motion to suppress the evidence in the within case is denied for the reasons stated on the record in open court.

/s/ Barron P. McCune
BARRON P. McCUNE
Senior United States
District Judge

cc: William V. Conley, A.U.S.A.

E. Larry Kovel, Esq.
310 Ft. Couch Road
Pittsburgh, Pa. 15241

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

SEARCH WARRANT

Case Number: 88-62M

In the Matter of the Search of

A black canvas Spalding gym bag with red handles, stripes and trim, approximately 12"x28" x15" in dimension and weighing approximately 30 pounds

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TO: *Special Agent Alex Schiraj of the Drug Enforcement Administration* and any Authorized Officer of the United States.

Affidavit(s) having been made before me by *Special Agent Alex Schiraj* who has reason to believe that on the premises known as

a black canvas Spalding gym bag with red handles, stripes and trim, approximately 12"x28"x15" in dimension and weighing approximately 30 pounds

in the Western District of Pennsylvania there is now concealed a certain person or property, namely

a quantity of controlled substance or substances, papers or documents reflecting ownership of the bag and/or financial transactions, U.S. currency, firearms, or other weapons, and paraphenalia used to package or consume controlled substances bearing the fruits, instrumentalities, and evidence of the distribution of controlled substances, in violation of Title 21, U.S.C., Sections and 841 and 846.

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for issuance of this warrant.

YOU ARE HEREBY COMMANDED to search on or before *March 14, 1988* (not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and making the search (in the daytime—6:00 A.M. to 10:00 P.M.) (at any time in the day or night as I find reasonable cause has been established) and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to _____ U.S. Judge or Magistrate as required by law.

March 4, 1988, 9:00 P.M.
Date and Time Issued

Gary L. Lancaster, US Magistrate
Name and Title of Judicial Officer

Pgh, PA
City and State

/s/ Gary L. Lancaster
Signature of Judicial Officer